



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 38

RIN 2900-AP75

Authority to Solicit Gifts and Donations

AGENCY: Department of Veterans Affairs.

ACTION: Direct final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its National Cemeteries regulation on the prohibition of officials and employees of VA from soliciting contributions from the public or authorizing the use of their names, name of the Secretary, or the name of VA for the purpose of making a gift or donation to VA. The amended regulation gives the Under Secretary of Memorial Affairs (USMA), or his designee, authority to solicit gifts and donations, which include monetary donations, in-kind goods and services, and personal property, or authorize the use of their names, the name of the Secretary, or the name of VA by an individual or organization in any campaign or drive for donation of money or articles to VA for the purpose of beautifying, or for the benefit of, one or more national cemeteries.

DATES: This direct final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], without further notice, unless VA receives a significant adverse comment by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If we receive a significant adverse comment by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE

FEDERAL REGISTER], we will publish a document in the Federal Register withdrawing this rule before the effective date. See section on Administrative Procedure Act below.

ADDRESSES: Written comments may be submitted by email through <http://www.regulations.gov>; by mail or hand-delivery to Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free number.) Comments should indicate that they are submitted in response to “RIN 2900-AP75 – Authority to Solicit Gifts and Donations.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Thomas Howard, Chief of Staff, National Cemetery Administration (NCA), Department of Veterans Affairs, (40A), 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-6215. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Title 38 U.S.C. 2407 authorizes the Secretary of VA to “accept gifts, devises, or bequests from legitimate societies and organizations or reputable individuals, made in any manner, which are made for the purpose of

beautifying national cemeteries, or are determined to be beneficial to such cemetery.”

In 1978, VA published implementing regulations for this authority at 38 CFR 1.603 (now redesignated as 38 CFR 38.603). 43 FR 26572 (June 21, 1978). Included in this regulation, at § 38.603(b), is a prohibition on the solicitation of contributions from the public by any VA official or employee. Unfortunately, as was common at the time, the proposed and final rulemaking documents provide less information regarding the rationale for the regulations than is commonly provided today, so the full rationale for this regulation, including the reason for the prohibition on solicitations, is no longer available. The prohibition is not contained in the statutory authority at section 2407, nor does the plain language of the statute indicate a rationale for the prohibition. VA is easing this restriction because it negatively impacts VA’s ability to fully realize the potential of its authority to accept gifts and donations for the benefit of the national cemeteries.

The gift and donation acceptance authority at section 2407 is just one of several authorities under which VA may accept gifts or donations that advance the mission or enhance the services that VA provides. These authorities include, among others, 38 U.S.C. 521 (acceptance of funds to support recreational activities furthering the rehabilitation of disabled veterans); 2406 (gifts of land for national cemeteries); 8103 and 8104 (acceptance of land, interests in land, or facilities for use as medical facilities); and 8301 (acceptance of gifts for use in carrying out all laws administered by VA). None of these statutory authorities nor any implementing regulations for any of the authorities, includes a provision like that contained in § 38.603(b), prohibiting the solicitation of contributions.

Legal guidance indicates that such a prohibition is not required by law. In 2015, VA's Office of General Counsel (OGC) issued a precedent opinion concluding that VA's express statutory authority to accept gifts under section 8301 included the implied statutory authority to solicit those gifts. VAOPGCPREC 2-2015, Mar. 20, 2015. Outside VA, a 2001 opinion from the Office of Legal Counsel (OLC) of the Department of Justice found that the broad statutory authority granted by Congress in section 403(b)(1) of the Office of Government Ethics Authorization Act of 1996 to accept gifts implies the authority to solicit gifts. 25 Op. OLC 55, Jan. 19, 2001. VA believes that section 2407 similarly contains an implied statutory authority to solicit gifts and donations for the benefit of the national cemeteries and that, by prohibiting use of that implied statutory authority, the provision in § 38.603(b), in addition to not being legally necessary, may impede VA's ability to fully realize the authority provided to VA in section 2407. The ability of VA to operate other gift and donation programs under the authorities mentioned above, effectively and within legal parameters, in the absence of a prohibition on the ability of principals to solicit gifts and donations, indicates that a prohibition like that contained in § 38.603(b) is unnecessary.

Gifts and donations received by the national cemeteries under the authority of section 2407 have taken many forms, including monetary donations, donations of services and property (such as landscaping services or trees), and memorials and other commemorative works. Consistent with the plain language of the terms "gifts" and "donations," we clarify in the regulation that gifts and donations would include monetary donations, in-kind goods and services, and personal property. These gifts and donations from generous persons and organizations enhance the experience of visitors

to the national cemeteries. The prohibition contained in § 38.603(b) impedes VA's ability to proactively advise donors or potential donors of gift and donation opportunities that could be beneficial to the national cemeteries. Although § 38.603(b) includes a provision that allows VA employees to discuss the "appropriateness" of a proposed gift, that discussion can only happen if a donor first approaches VA about a potential gift or donation. VA cannot proactively advise a donor that a particular gift or donation would be beneficial to the national cemeteries in general or any one national cemetery in particular. Easing the prohibition benefits not only the national cemeteries by ensuring that gifts and donations are more likely to be beneficial, but also is beneficial to donors who may not know of opportunities to provide beneficial gifts and donations to the national cemeteries. Therefore, we are amending § 38.603(b) to provide that the USMA, or his designee, may solicit gifts and donations, which include monetary donations, in-kind goods and services, and personal property, or authorize the use of their names, the name of the Secretary, or the name of VA by an individual or organization in any campaign or drive for money or articles to VA for the purpose of beautifying, or for the benefit of, one or more national cemeteries.

While VA is easing the prohibition on solicitation of gifts and donations, the intent is not to remove the restriction in its entirety. VA maintains 133 national cemeteries, one national Veterans' burial ground, and 33 soldiers' lots and monument sites in 40 states and Puerto Rico, as national shrines, that is, places of honor and memory where visitors can sense the serenity, historic sacrifice, and nobility of purpose of those who have served in the military. The USMA is responsible for the operation of the national cemeteries and is in the best position to determine the appropriateness of

any campaign to solicit gifts and donations. Although VA is replacing the existing provision at § 38.603(b) with revised text that allows the USMA or designee to solicit gifts and donations to VA for the purpose of beautifying, or for the benefit of, one or more national cemeteries, this rulemaking does not amend any other regulation governing solicitation or acceptance of gifts and donations under any other authority available to VA.

We are revising the authority citation for part 38 to include the statutory authority 38 U.S.C. 2407. We also add this statutory authority at the end of § 38.603.

#### Administrative Procedure Act

VA believes this rule is non-controversial and anticipates that it will not result in any significant adverse comments, and, therefore, is issuing this regulatory amendment as a direct final rule. VA is only minimizing the restriction to commensurate with statutory authority and legal guidance from VA's OGC and an opinion from DOJ's OLC. VA is publishing a separate, substantially identical proposed rule in the Federal Register, RIN 2900-AP74, that will serve as a proposal for the provisions in this direct final rule in the event that any significant adverse comment is received by VA.

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without change. If VA receives a significant adverse comment, VA will publish a notice of receipt of a significant adverse comment in the Federal Register and withdraw the direct final rule. In determining whether an adverse comment is significant and warrants

withdrawing a direct final rule, we will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process in accordance with section 553 of the Administrative Procedure Act (5 U.S.C. 553).

Comments that are frivolous, insubstantial, or outside the scope of the rule will not be considered adverse under this procedure. For example, a comment recommending an additional change to the rule will not be considered a significant adverse comment unless the comment states why the rule would be ineffective or unacceptable without the additional change.

Under direct final rule procedures, if no significant adverse comment is received within the comment period, this rule will become effective on the date specified above. After the close of the comment period, VA will publish a document in the Federal Register indicating that VA received no significant adverse comment and restating the date on which the final rule will become effective. VA will also publish a notice in the Federal Register withdrawing the proposed rule, RIN 2900-AP74.

In the event that VA withdraws the direct final rule because of receipt of any significant adverse comment, VA will proceed with the rulemaking by addressing the comments received and publishing a final rule. The comment period for the proposed rule runs concurrently with that of the direct final rule. VA will treat any comments received in response to the direct final rule as comments regarding the proposed rule as well. VA will consider such comments in developing a subsequent final rule. Likewise, VA will consider any significant adverse comment received in response to the proposed rule as a comment regarding the direct final rule as well.

VA has determined that it is not necessary to provide a 60-day comment period for this rulemaking because the rulemaking does not establish duties or benefits affecting members of the public, but merely makes a minor modification concerning the authority of certain officials or employees to solicit gifts and donations for the benefit of VA national cemeteries. VA has instead specified that comments must be received within 30 days after date of publication in the Federal Register.

#### Effect of Rulemaking

The Code of Federal Regulations, revised by this rulemaking, represents the exclusive legal authority on this subject. No contrary rules or procedures are authorized. All VA guidance will conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

#### Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).



### Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm>, by following the link for “VA Regulations Published From FY 2004 Through Fiscal Year to Date.”

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

## Catalog of Federal Domestic Assistance

There are no Catalog of Federal Domestic Assistance program numbers and titles affected by this document.

## Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on June 30, 2016, for publication.

Dated: June 30, 2016:

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Jeffrey Martin  
Office Program Manager  
Office of Regulation Policy & Management  
Office of the Secretary  
Department of Veterans Affairs

## List of Subjects in 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Claims, Crime, Veterans.

For the reasons set out in the preamble, VA amends 38 CFR part 38 as follows:

## PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS

### AFFAIRS

1. Revise the authority citation for part 38 to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 2306, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

2. In § 38.603, revise paragraph (b) and add an authority citation to read as follows:

### § 38.603 Gifts and donations.

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(b) The Under Secretary of Memorial Affairs, or his designee, may solicit gifts and donations, which include monetary donations, in-kind goods and services, and personal property, or authorize the use of their names, the name of the Secretary, or the name of the Department of Veterans Affairs by an individual or organization in any campaign or drive for donation of money or articles to the Department of Veterans Affairs for the purpose of beautifying, or for the benefit of, one or more national cemeteries.

(Authority: 38 U.S.C. 2407)

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